Ronald Philip Devereux & Anor v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–91 OF 2011
SEE MEE CHUN JC
9 MAY 2012

Civil Procedure — Contempt of court — Breach of consent order — Application by contemnors to set aside contempt of court order — Whether notice of motion for contempt was in order — Whether contemnors protected from being cited for contempt — Mode of commencement — Action against public authority — Whether action should commenced by way of judicial review or relator action — Local Government Act 1971 s 13 — National Land Code s 433B(1)(b) — Government Proceedings Act 1956 s 8(1)

Public Servants — Liability — Committal proceedings against public servants — Whether public servants protected from being cited for contempt — Local Government Act 1971 s 13

The plaintiffs were Australian citizens who had purchased two condominium units in Kondo Istana. No strata titles had yet been issued in respect of the units. In the meantime, the plaintiffs had filed an action against the defendants for a breach of their proprietary and private rights in the condominium units. Thereafter, the plaintiffs and first defendant had entered into a consent judgment, which essentially required the first defendant to revoke the building approval and other approvals it had been granted and to demolish certain illegal and unauthorised structures. The consent judgment was served personally on Yang Dipertua ('the President') and the secretary of the first defendant local authority. However, the plaintiffs claimed that the first defendant had failed to comply with the consent judgment. The plaintiffs thus applied for and obtained leave to issue committal proceedings against the President and the secretary of the first defendant ('the alleged contemnors'). The instant application was the alleged contemnor's application to set aside the plaintiffs' application for a contempt of court order against the alleged contemnors. The alleged contemnors submitted that as public servants they were protected from liabilities in the discharge of their duties. They further submitted that the plaintiffs' action should have been commenced by way of judicial review or relator action.

Held, dismissing the application:

(1) Since the first defendant local authority is a corporation, it followed that

the officers of the first defendant would be liable for contempt. Thus the President and secretary of the first defendant, as the officers who were ultimately responsible for the management of the first defendant could be cited for contempt as the alleged contemnors. Hence, although the consent judgment was in the first defendant's name the notice of motion for contempt naming the alleged contemnors was in order as they were the persons responsible for ensuring compliance of the consent judgment. Further, the relevant cause papers were served personally on the alleged contemnors (see paras 4–5).

(2) Although the alleged contemnors were public servants they were not protected from a charge of contempt (see paras 6–7).

(3) The alleged contemnors' argument that the plaintiffs being non-citizens were disentitled from coming to court by virtue of s 433B(1)(b) of the National Land Code ('NLC') had no merit. It was found that s 433B(1)(b) of the NLC was not applicable as strata titles had yet to be issued in respect of the units. At the same time by virtue of the sales and purchase agreements and deeds of assignment the plaintiffs had entered into when purchasing the units, the plaintiffs had acquired rights to the units in Kondo Istana (see paras 10–12).

(4) The alleged contemnors' argument that the plaintiffs' action should have been commenced by way of judicial review or relator action could not stand. Since the plaintiffs sought to protect both their proprietary and private law rights, an application under O 53 of the Rules of the High Court 1980 would not be suitable in the present case. The plaintiffs' right of action was also independent of s 8(1) of the Government Proceedings Act 1956. As such, a relator action would also not be suitable in the present case (see paras 14–17).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan warganegara Australia yang membeli dua unit kondominium di Kondo Istana. Hak milik strata belum diberikan berkaitan dengan unit-unit tersebut. Sementara itu, plaintif-plaintif memfailkan tindakan terhadap defendan-defendan bagi kemungkiran hak-hak proprietari dan persendirian di dalam unit-unit kondominium tersebut. Kemudian, plaintif-plaintif dan defendan pertama memasuki penghakiman persetujuan, yang pada asasnya memerlukan defendan pertama membatalkan kebenaran membina dan lain-lain kebenaran yang ia telah berikan dan merobohkan struktur-struktur tertentu yang haram dan tidak diberi kuasa. Penghakiman persetujuan tersebut diserahkan secara kediri kepada Yang Dipertua ('YDP') dan setiausaha pihak berkuasa tempatan defendan pertama. Walau bagaimanapun, plaintif-plaintif menuntut bahawa defendan pertama telah gagal untuk mematuhi penghakiman persetujuan tersebut. Plaintif-plaintif oleh itu memohon dan memperoleh kebenaran untuk memulakan prosiding

komital terhadap YDP dan setiausaha defendan pertama ('penghina-penghina yang didakwa'). Permohonan ini adalah permohonan oleh penghina-penghina yang didakwa untuk mengetepikan permohonan plaintif-plaintif untuk perintah penghinaan mahkamah terhadap penghina-penghina yang didakwa. Penghina-penghina yang didakwa menghujahkan bahawa sebagai penjawat awam mereka dilindungi daripada liabiliti dalam melaksanakan tugas mereka. Mereka selanjutnya menghujah bahawa tindakan plaintif-plaintif sepatutnya dimulakan secara semakan kehakiman atau tindakan pemaklum.

Diputuskan, menolak permohonan:

(1) Oleh sebab pihak berkuasa tempatan defendan pertama adalah satu Perbadanan, berikutan itu pegawai-pegawai defendan pertama bertanggungan bagi penghinaan. Oleh demikian, Presiden dan setiausaha defendan pertama, sebagai pegawai-pegawai yang paling bertanggungjawab bagi pengurusan defendan pertama boleh dinamakan bagi penghinaan sebagai penghina-penghina yang didakwa. Maka, walaupun penghakiman persetujuan adalah atas nama defendan pertama, notis usul bagi penghinaan menamakan penghina-penghina yang didakwa adalah teratur kerana mereka adalah orang yang bertanggungjawab dalam memastikan pematuhan penghakiman persetujuan tersebut. Selanjutnya, kertas-kertas kausa yang relevan diserahkan secara kediri kepada penghina-penghina yang didakwa (lihat perenggan 4–5).

(2) Walaupun penghina-penghina yang didakwa adalah penjawat awam mereka tidak dilindungi daripada pertuduhan penghinaan (lihat perenggan 6–7).

(3) Hujahan penghina-penghina yang didakwa bahawa plaintif-plaintif sebagai bukan warganegara tidak berhak mengambil tindakan di mahkamah berikutan s 433B(1)(b) Kanun Tanah Negara ('KTN') tidak bermerit. Didapati bahawa s 433B(1)(b) KTN tidak terpakai kerana hak milik strata belum diberikan berkaitan dengan unit-unit tersebut. Pada masa yang sama berikutan perjanjian jual beli dan surat ikatan penyerahan hak, yang dimasuki oleh plaintif-plaintif semasa membeli unit-unit tersebut, plaintif-plaintif telah memperoleh hak kepada unit-unit di Kondo Istana tersebut (lihat perenggan 10–12).

(4) Hujahan penghina-penghina yang didakwa bahawa tindakan plaintif-plaintif sepatutnya dimulakan secara semakan kehakiman atau tindakan pemaklum tidak boleh diterima. Oleh sebab plaintif-plaintif memohon perlindungan untuk kedua-dua hak-hak proprietari dan undang-undang persendirian mereka, pengunaan A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak sesuai bagi kes ini. Hak tindakan

plaintif-plaintif juga berasingan daripada s 8(1) Akta Prosiding Kerajaan 1956. Dengan itu, tindakan pemaklum juga tidak sesuai dalam kes ini (lihat perenggan 14–17).]

Notes:

For cases on breach of consent order, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1888–1890.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan dan Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Jalaludeen a/l Abdul Aziz v Thurmalingam a/l S Rajadurai & Anor [2002] 1 MLJ 237, HC (refd)

UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals [2007] 6 MLJ 530, CA (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Government Proceedings Act 1956 ss 2, 6, 8, 8(1),(2), 29(2)
Local Government Act 1976 ss 2, 10(1), 13, 25(1), 31, 101(p)(ii), 125
National Land Code ss 52, 433B(1)(b)
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 52 r 5A, O 53

Karin Lim Ai Ching (Murgan D Maniam with her) (Presgrave & Matthews) for the plaintiffs.

Terrance Simon Marbeck (CK Goh with him) (Goh Rafidah Tan) for the alleged contemnors.

See Mee Chun JC:

[1] On 12 July 2011 a consent judgment was entered into between the plaintiffs and the first defendant ('D1'). The consent judgment in relation to Kondo Istana essentially requires D1 to revoke approvals granted including building plan approval, demolish illegal and unauthorised structures and provide documents. The consent judgment was served personally on D1's Yang Dipertua ('YDP') Zabudin bin Hat ('ZH') and secretary ('Mahamad Suhaimi bin Man') ('MS'). On 30 January 2012. On 30 January 2012 leave for an order of committal against YDP and secretary was granted by the court. The plaintiffs then filed its application in encl (52) that ZH and MS be committed to prison for contempt of court. Enclosure (57) is the application of ZH and MS to set aside the plaintiffs' application of encl (52).

A PRIMA FACIE CASE FOR CONTEMP

[2] As stated leave to issue committal proceedings was granted on 30 January 2012 which means there was a prima facie for contempt. In *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 at pp 221–222 it was stated:

B

> … leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted there was a prima facie case for contempt against the appellants. It may well be that on the hearing of the motion proper, the appellants will be acquitted of any charge of contempt ….

C

GROUNDS FOR WHICH COMMITTAL SOUGHT PARTICULARISED

[3] The particulars of non-compliance were set out in the statement to show how D1 has failed to comply with the consent judgment — encl (47).

D

LIABILITY OF ZH AND MS

[4] Order 52 r 5A of the Rules of the High Court 1980 ('RHC') provides if a corporation is guily of contempt the court may fine the corporation who caused or wilfully permitted or contributed to the contempt. In this instance D1 being a local authority is a corporation as s 13 of the Local Government Act 1976 ('Act 171') states every local authority shall be a body corporate. It follows that officers of D1 may be liable for contempt and since YDP and secretary are the officers of D1 ultimately responsible for the management of D1 and in this instant case compliance of the consent judgment it also follows ZH as the current YDP and MS as secretary may be cited for contempt (alleged contemnors).

E

F

[5] Section 10(1) of the Act 171 provides a local authority shall consist of President (YDP) and not less than eight and not more than 24 other councillors, to be appointed by the state authority. Section 25(1) states YDP chairs all meetings of the local authority. In relation to the secretary, s 2 states it to mean the chief administrative officer. Hence although the consent judgment was in D1's name the notice of motion for contempt naming alleged contemnors was in order as they are the persons responsible for ensuring compliance of the consent judgment. Although ZH was appointed YDP on 17 July 2011, after the consent judgment was entered into, this is not material as he is now responsible by virtue of being the current YDP. The relevant cause papers were served personally on alleged contemnors.

G

H

I PROTECTION TO ZH AND MS

[6] It was submitted alleged contemnors as public servants are protected in the discharge of their duties and ss 31 and 125 of the Act 171 were relied on. The aforesaid sections provide:

Validity of acts of local authority officers

31(1) All acts of … President, … Secretary … shall, not withstanding that it be discovered that there was some defect in the appointment of any such person or that he was disqualified, be valid and effectual as if such person had been duly appointed and qualified.

Protection … from personal liability

125(1) No matter or thing done … by the … President, … officer … of the local authority … shall, if the matter or thing was done... for the purpose of carrying out the provisions of this Act … subject him personally to any action, liability, claim or demand whatsoever.

[7] These provisions do not confer such protection. Section 31 deals with the validity of acts of YDP and secretary if their appointments were defective while s 125 protects them from personal liability.

[8] Sections 6 and 29(2) of the Government Proceedings Act 1956 do not apply as D1 being a local authority does not fall within the interpretation of 'Government' in s 2 which is the Federal and State Governments.

[9] Section 101(p)(ii) of the Act 171 is only an enabling provision without more that a local authority can convert use of buildings. Section 52 of the National Land Code ('NLC') on land use does not confer on D1 the power to act contrary to land use approved by the state authority.

SECTION 433B(1) OF THE NLC

[10] It was also raised that the plaintiffs being non citizens were not in compliance of s 433B(1)(b) of the NLC thereby disentitling them from coming to court. Section 433B(1)(b) provides:

433B(1) Notwithstanding anything contained in this Act or in any other written law —

(b) a dealing under Division IV with respect to alienated land or an interest in alienated land may be effected in favour of a non citizen or to a foreign company

But only after the prior approval of the State Authority has been obtained upon an application in writing to the State Authority by such non citizen or foreign company.

[11] The plaintiffs are Australian citizens who had purchased two units in Kondo Istana vide sale and purchase agreements ('S&P') dated 22 December 2009 and 28 December 2009 and deed of assignments dated 9 March 2010. No strata titles have been issued. In this regard *Jalaludeen a/l Abdul Aziz v*

Thurmalingam a/l S Rajadurai & Anor [2002] 1 MLJ 237 has stated at p 243 that ' s 433B(1)(b) of the NLC applies only to 'dealings' and does not apply to a sale and purchase agreement'. The Kedah State Lands and Mines Office vide letter dated 5 April 2012 (exh 'MM2') in response to a query from the plaintiffs' counsel stated in para 2:

> … warganegara asing tidak perlu memperolehi kelulusan Pihak Berkuasa Negeri untuk menyempurnakan Perjanjian Jual Beli dan Suratikatan Penyerahanhak kerana perkara tersebut adalah diluar bidang kuasa pejabat Pengarah Tanah Dan Galian Negeri Kedah. Kelulusan Pihak Berkuasa Negeri hanya perlu diperolehi sekiranya warganegara asing terbabit ingin memperolehi hartanah tersebut dengan mendaftarkan nama mereka di atas surat hakmilik yang berkenaan.

[12] Section 433B(1)(b) of the NLC is not yet applicable as strata titles have not been issued and no approval from state authority is required for S&P and deed of assignment. By virtue of the S&P and deed of assignment the plaintiffs have acquired rights to the units in Kondo Istana.

LIMITATION

[13] Section 2(a) of the Public Authorities Protection Act 1948 does not apply as the S&P was entered into in 2009 and the deeds of assignment executed in 2010.

MODE OF COMMENCEMENT

[14] The issue here is whether the action should have commenced by way of judicial review or relator action. In the plaintiffs' pleadings and affidavits they have asserted their proprietary right in their units in Kondo Istana and their private right have been interfered with. The plaintiffs are applying for various declaratory orders. That being the case, where the plaintiffs seek to protect both proprietary and private law rights an O 53 application is not appropriate. In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan dan Kesenian Johor & Ors* [2010] 3 MLJ 145 it was stated at p 172:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority the mode to commence such action under O 53 of the RHC is not suitable.

[15] With regard to relator action it is in relation to a public nuisancebrought by the attorney general or two or more persons who have obtained the consent of the attorney general — s 8(1) of the Government Proceedings Act 1956. However s 8(2) states that nothing in s 8 shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

[16] In *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530 it was stated at p 556:

> In my judment, on the above analysis of facts, the public nuisance collectively caused by the three defendants herein is actionable at the instance of the supermarket whose right of suit is independent of s 8(1). The concerted acts of the three defendants had inflicted on the supermarket special damage not merely in degree but also different in kind in the exercise or enjoyment of its rights and convenience. Such special damage is over and above that suffered by members of the public generally as users of the road and customers of the supermarket. In the circumstances, the supermarket has succeeded in proving public nuisance on a balance of probabilities against all the three defendants.

[17] The plaintiffs' right of action is thus independent of s 8(1) as their proprietary and private law rights have been affected. Further their claim is founded on a breach of law and not solely on nuisance. Hence a relator action is not appropriate.

CONCLUSION

[18] For the above reasons alleged contemners' application in encl (57) to set aside plaintiffs' application for committal vide encl (52) was dismissed.

Application dismissed.

Reported by Kohila Nesan